

Marokiv. Gonzales, 03-73789

MAR 10 2006

Kleinfeld, Circuit Judge, dissenting:

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

I respectfully dissent.

The law requires us to determine whether the IJ offered a “legitimate articulable basis” for questioning Maroki’s credibility or a “specific, cogent reason for any stated disbelief.”¹ The majority finds that Maroki’s explanations for her inconsistent testimony could have been credited and that there may have been legitimate explanations for her inconsistencies or omissions. But this is not the test. Rather, we may only reverse an IJ’s “not credible” finding if the record compels the inference that the witness was credible.² We must therefore uphold the IJ’s finding so long as a rational judge could have found as he did. There is sufficient support in the record for the IJ’s no credibility finding in this case.

There were serious inconsistencies between Maroki’s earlier and later testimony and in the papers that went to the heart of her asylum claim. Though she testified before the IJ that her family left Iraq due to her father’s torture, she never mentioned her father’s alleged torture in her credible fear interview. She said then that he was in a car accident with the police and that the police refused to call an

¹ Gui v. INS, 280 F.3d 1217, 1225 (9th Cir. 2002)

² See INS v. Elias-Zacarias, 502 U.S. 478, 481 n.1 (1992).

ambulance. Neither did she mention her own troubles with the police. Instead, she explained at her credible fear interview that her Christianity was the reason she feared returning to Iraq. The majority dismisses these as “details.” That unduly minimizes a big difference. If her father’s mistreatment or her own run-ins with Iraqi police were really the primary motivations for leaving Iraq, the IJ could reasonably expect her to mention them at the interview. Her father’s torture theory does not appear until her pre-trial statement, filed nine months after the interview. It was reasonable for the IJ to doubt the veracity of these kinds of *post litem motam* reasons.

The majority also discounts what Maroki concedes were direct and intentional lies in her interview with customs officials. While she told them that she came from Turkey, that the smuggler traveled on the plane with her, and that she and her family separated in Iraq, these were flat out lies. The majority correctly notes that the IJ accepted as valid Maroki’s explanation for this lie—that her smuggler told her to lie and threatened her. But the IJ did not use this as evidence in itself that Maroki’s story was untrue, but to conclude that Maroki’s willingness to lie to one government official indicated a willingness to lie to another. It is clear that Maroki was willing to tell direct lies to immigration officials when it was to her advantage. It may have been in Maroki’s interest to lie

to the customs officials, but it was also in her interest to lie to the IJ to get asylum, if she was believed. Regardless of whether the reasons for lying are rational, the person who tells them is still a liar. The IJ cannot be faulted for drawing the logical inference that Maroki, willing to lie to immigration officials under one circumstance, might be willing to lie to immigration officials under another. An inclination to lie to obtain immigration benefits *plus* admitted lies *plus* inconsistencies tending to prove other such lies adds up to substantial evidence, based on the record as a whole, for rejecting the petitioner's credibility.

I cannot agree with the majority's implication that Maroki did not understand the questions asked. She was represented by counsel throughout several months of hearings. She had a translator. She never complained that she couldn't understand the interpreter or expressed any difficulty with the interpreters. Though the majority's discussion on whether Maroki was "arrested" or "interrogated" or "detained" may look like misunderstandings rather than lies, there was plenty of undeniable lying.

Instead of upholding the IJ's finding because a rational judge could have found her not credible, the majority reverses because a rational judge could have found her credible. That turns the standard of review on its head.

Rather than examining each factor in isolation and according no weight to

any factor which Maroki might reasonably explain away, we must to look at the evidence as a whole to determine whether the IJ could rationally have concluded that Maroki was not credible.

A New IJ on Remand

Even if I thought the majority was correct, I would not join its unwarranted suggestion that the case be reassigned. There is no sign of bias in this case nor is there anything suggesting that the IJ would have difficulty putting aside his views, so reassignment is not justified.